

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE CITY OF RIVERVIEW,

Plaintiff-Appellant,

V

ALTHA MAUDE TOWLE,

Defendant-Appellee.

UNPUBLISHED

April 26, 2011

No. 295885

Wayne Circuit Court

LC No. 2009-020671-AR

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Plaintiff appeals, by leave granted, the circuit court's order reversing the judgment of conviction against defendant that was entered following a jury trial in the district court. We reverse the circuit court's order and reinstate defendant's conviction for the reasons set forth in this opinion.

On December 11, 2008, defendant was driving her vehicle in the City of Riverview when, according to a Riverview police officer, she failed to yield the right of way to his patrol car, then proceeded directly in front of the car, driving over a curb in the process. The officer pulled defendant over for a traffic offense and to investigate for possible drunk driving. According to the officer, when he made contact with defendant, he observed signs of her being under the influence. After failing several sobriety tests, defendant advised the officer that she had taken her prescribed medications earlier in the day. Defendant was arrested on suspicion of operating under the influence, and blood tests performed on that date confirmed that defendant had prescription drugs present in her system. Defendant was thereafter charged with operating under the influence of a controlled substance contrary to MCL 257.625(1).

Prior to trial, the prosecutor moved to limit the testimony of defendant's husband, who did not personally witness the incident, to specific facts at issue and to disallow him to express his personal views and opinions regarding the City of Riverview Police Department. Apparently, in 2006, defendant's son died of a drug overdose and defendant and her husband were displeased with the way the Riverview Police Department handled their investigation into the death. Defendant and her husband thereafter both vocally criticized the Riverview Police Department and erected an 8 x 5 foot billboard in their yard (just a few blocks from the police station) expressing their criticism of the department. The prosecution sought to limit the testimony of defendant's husband only to that relating to the specific facts in dispute, contending

that defendant's husband sought to use the trial as a platform for expressing his views and opinions concerning the Riverview Police Department and that such views had no bearing on the issues at trial. The district court granted the prosecutor's motion, prohibiting any witness from "mentioning, referring to, or asking questions relating to the death of the defendant's son, and any yard signs" because the district court found such information irrelevant and misleading to the jury. The district court did, however, indicate that defendant could cross examine witnesses concerning bias.

During the course of the trial, defendant sought to have a jail questionnaire admitted into evidence. Testimony established that such questionnaires were typically prepared when a person was arrested and brought to jail, and that the questionnaire prepared with respect to defendant specified that there were no signs that defendant was under the influence of drugs and alcohol and that these substances were not a factor for her being in custody. The district court denied admission of the questionnaire because neither the arresting officer nor the custodian of records could state with certainty who authored the document, such that there was no foundation for its admission.

After being convicted by jury of the lesser charge of operating while visibly impaired MCL 257.625(3), defendant appealed to the circuit court. Defendant asserted as errors the district court's preclusion of evidence of the arresting officer's bias and the jail questionnaire prepared in defendant's case, and its denial of defendant's directed verdict motion for acquittal. The circuit court reversed defendant's conviction and remanded the matter back to the district court for a new trial, specifically directing that:

the defense shall be entitled to present both direct evidence in the course of the presentation of its case and evidence on cross-examination of plaintiff's witnesses for the purpose of fully exploring the issue of bias on the part of the Riverview Police Department and/or individual members thereof towards Defendant, Altha Maude Towle, and her family, including the Towle's prior criticism of the Riverview Police Department in conducting its investigation into the death of their son and the erection of signs on their property related thereto, and any prior contact the Riverview Police Department or individual members thereof had with the Towles concerning [the] same.

The circuit court also directed that the jail questionnaire previously excluded by the trial court be admitted into evidence at retrial, but denied defendant's request for a directed verdict of acquittal. This appeal followed.

On appeal, the prosecution contends that the circuit court employed an erroneous standard of review in determining that the evidence excluded by the district court should, in fact, have been admitted and that had the circuit court employed the proper standard of review, it would have affirmed defendant's conviction. While we disagree that the circuit court employed an improper standard of review, we agree that the circuit court improperly reversed defendant's conviction.

A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). The trial court's decision

on close evidentiary questions cannot “by definition” be an abuse of discretion. *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982). However, where decisions regarding the admission of evidence involve preliminary questions of law such as whether a rule of evidence or statute precludes admissibility, our review is de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Here, the district court refused to admit the testimony of Mr. Towle on the basis that it was irrelevant under MRE 401, and was both misleading to the jury and unfairly prejudicial under MRE 403(b). To the extent that the circuit court determined that the district court erred in refusing to admit the evidence under a rule of evidence, such as MRE 402 or 403, the circuit court’s review under an alleged de novo standard was not improper.

That being said, finding an error in the admission or exclusion of evidence does not necessarily require that the defendant’s conviction be set aside. Because the error was preserved, nonconstitutional error, the circuit court must also review the error to determine whether it was outcome determinative:

The standard [for preserved nonconstitutional errors] is derived from MCL 769.26, which provides, in part:

No judgment or verdict shall be ... reversed ... in any criminal case, on the ground of ... the improper admission ... of evidence, ... unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001).

In reversing the district court, the circuit court did not engage in a harmless error analysis. Instead, it simply stated that the challenged evidence should have been presented to the jury, indicating, “the result may have been the same but the information should have been presented.” Based upon the above, and because we find the circuit court’s ultimate determination incorrect under either a de novo or an abuse of discretion standard, we reverse the circuit court’s order.

Here, the district court found that Mr. Towle’s testimony concerning his family’s opinions about the Riverview Police Department’s investigation into their son’s death was irrelevant. Under MRE 402, relevant evidence is generally admissible. Conversely, evidence which is not relevant is not admissible. MRE 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Nevertheless, even relevant evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .” MRE 403.

It is undisputed that Mr. Towle did not witness the incident giving rise to defendant’s arrest. His testimony, by all accounts, would necessarily focus on the potential bias of the arresting officer, allegedly based upon the Towles’ prior criticism of the Riverview Police Department. The defense’s position appeared to be that the arresting officer fabricated the basis for pulling over defendant simply as a measure of retaliation.

Defendant is correct that proof of bias is almost always relevant. *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001). Bias is a common-law evidentiary term used “to describe the relationship between a party and a witness . . . in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest.” *Id.*, quoting *United States v Abel*, 469 US 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984). But, a trial court has wide discretion regarding the admissibility of evidence of bias. *Layher*, 464 Mich at 768.

In this matter, the district court excluded testimony pertaining to the death of the Towle's son and the signage in their yard criticizing the Riverview Police Department. It did not, however, preclude *all* evidence concerning the potential bias of the arresting officer against defendant. The district court specifically ruled that defendant would be allowed to cross-examine any witnesses as to bias and could bring in any witnesses and testimony to expose potential bias, other than the death of the Towle's son and the signage in their yard. Defendant, then, was free to explore the arresting officer's potential bias through other evidence. That she may not have done so cannot be construed as error attributable to the district court.

Moreover, there has been no indication that the arresting officer was involved in the investigation into the death of the Towle's son, or, that if he was, the extent to which he was involved. The officer testified that he met defendant once prior, but had never seen her drive before and had not previously pulled her over. And defendant testified that she had never met the arresting officer. Without linking the officer to the investigation, it would appear that Mr. Towle's testimony would be too tenuous to establish the officer's bias. There is also no indication that any criticism by the Towles was directed personally at the arresting officer. At a minimum, the ruling by the district court was a close evidentiary decision, which cannot be an abuse of discretion. *Golochowicz*, 413 Mich at 322.

With respect to the jail questionnaire, the prosecution contends that the document was properly excluded because the defense did not lay a foundation for its admission. Specifically, the prosecution points out that neither the arresting officer nor the police secretary was able to testify with certainty as to who authored the document. Defendant, on the other hand, asserts that the document was admissible under both MRE 803(6) and 803(8).

Assuming, without deciding, that the questionnaire was admissible, we find that any error in its exclusion was harmless. Defense counsel asked the arresting officer whether he prepared the questionnaire. When the officer responded that he did not know, it was elicited that the questionnaire was prepared under his computer log-in identification. Defense counsel then asked the arresting officer to read the questionnaire and asked the officer to identify the written response to the question “Are there signs of drug or alcohol use or abuse.” The officer testified that the questionnaire indicated “no.” Defense counsel also examined the custodian of the police records, Ms. Hoffman, concerning the questionnaire.

Ms. Hoffman testified that she did not know who authored the jail questionnaire but confirmed that it bore the log-in identification of the arresting officer. Ms. Hoffman also confirmed that the jail questionnaire stated that there were no signs of drug or alcohol use or abuse by defendant and that neither alcohol nor drugs was a factor for her being in custody. Thus, while the questionnaire itself was not admitted into evidence, the relevant evidence that

defendant sought to present from the document was, in fact, presented to the jury. Because the evidence defendant sought to admit was introduced through testimony, any error in failing to admit the questionnaire itself was not outcome determinative. The absence of the questionnaire was also harmless when one considers that defendant admitted that she had taken prescription medication on the morning of the incident, admitted that she brushed a curb when making a turn, and admitted that at least one of her prescription bottles bore a warning not to operate heavy machinery while taking the medication. Reversal of defendant's conviction on the basis of the excluded jail questionnaire was therefore improper.

Reversed and remanded for reinstatement of defendant's conviction. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Joel P. Hoekstra

/s/ Donald S. Owens